No. 21643

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MCGUIRE,

Appellant,

vs.

GENERAL FOODS,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S ANSWERING BRIEF.

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Statement of the Case.

This is an appeal from a summary judgment. The question is whether, if every conflict in the affidavits be resolved in favor of appellant McGuire, he has an antitrust case against General Foods. For that purpose, we first adopt McGuire's description of the facts most favorable to him:

> "The facts in the light most favorable to appellant are: GF paid to have eight television pilots made; appellant wrote, directed and produced two of the eight pilots; GF, after viewing the eight pilots, exercised its option and announced that it would sponsor McGHEE as a television series on CBS television network; GF tried several times to

> get CBS to exhibit McGHEE as a series but CBS refused; CBS tried to get GF to sponsor two series in which CBS had financial interests and controls (one of which was not even a pilot, but merely a title and idea); GF agreed with CBS that GF would sponsor the CBS shows." (Appellant's Br. pp. 63-64.)

We submit that General Foods' inability to get McGHEE on television does not violate the antitrust laws.

As a second observation, we have to add that we have quoted McGuire's version, based on his affidavit. But his affidavits consist entirely of hearsay. When the hearsay is deleted, all one has is the case of a potential TV program rejected because it was less appealing than others. We submit that it is not a violation of the antitrust laws to prefer another program.

ARGUMENT.

I.

The Complaint: Appellant's Affidavits and Appellant's Brief All Simply Say That General Foods Tried to Get McGHEE on CBS, but That CBS Would Not Take It. Appellant's Own Affidavits Show That There Is No Triable Issue of Conspiracy, Boycott or Monopoly.

Hearsay though it be, we start with McGuire's case. For even if all the inadmissible evidence be admitted, there is nothing here.

The gist of the complaint is that CBS had a policy of televising only shows that it owned; that General Foods did all it could to get McGHEE (appellant's show) on the air, and failed, solely because CBS would not let the show on the air. According to the complaint, Procter & Gamble and Philip Morris tried, and had no better luck. Why, on these facts, General Foods is sued, passes our understanding.

In detail, here is appellant's depiction of these events. [We omit his general rhetoric about conspiracy: a motion for summary judgment is not defeated by general allegations in the complaint. (F.R.C.P. 56(e).] Rule 56(e) requires that the appellant present particulars within his own knowledge by affidavit. However, the complaint's allegations are admissions, and usable against appellant.

The complaint alleges that CBS has evolved a policy of placing on television only programs which it owns. Nevertheless, according to the complaint, in the summer

of 1964 General Foods committed itself to finance eight television pilots for the 1965-66 season at a cost of $816,000. [Clk. Tr. p. 11.] Appellant was the producer of two of these pilots, one named "A MAN NAMED McGHEE," and the other named "MEET MAGGIE MULLIGAN." [Clk. Tr. p. 11, line 29; p. 12, line 8.]

The complaint in paragraph VI-11 then alleges that General Foods picked out McGHEE—saying that General Foods

> ". . . notified plaintiff . . . that McGHEE was the best of the eight television pilots and that they, defendant GF, intended to sponsor 'McGHEE' as a television series on prime time on Defendant CBS's television network for the 1965-1966 television season." [Clk. Tr. p. 12, line 10.]

The complaint then goes on to describe the submission of McGHEE to CBS and in paragraph VI-15 says:

> "Defendant CBS notified defendant GF that defendant CBS would not exhibit McGHEE on its television network. . . ." [Clk. Tr. p. 12, line 25.]

On the same page, the complaint describes a suggestion by CBS that another show ought to be put on the air and then describes a further effort by General Foods to get McGHEE on television. At paragraph VI-18, [Clk. Tr. p. 13, line 4] the following allegations appear:

> "Defendant GF along with its advertising agency, Benton & Bowles, met with defendant CBS and again advised defendant CBS that they wished to sponsor McGHEE on defendant CBS's television network during prime time *but defendant CBS refused to exhibit McGHEE*. . . ." (Emphasis added.)

Appellant's complaint seems to be that General Foods did not somehow or another succeed in overpowering CBS and compelling CBS to put McGHEE on television. How General Foods was to conquer CBS is nowhere made apparent.

CBS's refusal was ironclad. At paragraphs VI-21, 22 and 23 [Clk. Tr. p. 13] and VI-28 and 29 [Clk. Tr. p. 14], it is spelled out that CBS would not put these shows on the air for either Procter & Gamble or Phillip Morris. We quote:

> "21. Procter and Gamble and Phillip Morris Co., national television advertisers, had first call or a priority on the Monday, 9:30 p.m. time slot on Defendant CBS's television network.
>
> "22. Procter & Gamble and the Phillip Morris Co. viewed the 'McGhee' show and notified Defendant CBS that they wished to sponsor 'McGhee' as a television series on the Defendant CBS's television network during primetime in the Monday, 9:30 p.m. time slot.
>
> "23. Defendant CBS again refused to exhibit 'McGhee' on its television network and told Procter & Gamble and Phillip Morris Co. that if they wanted the 9:30 p.m. time slot on Monday evening, they would have to sponsor a television series to be called 'Selena'." [Clk. Tr. p. 13.]

And again,

> "27. At this particular time, February, 1965, Defendant CBS experienced a top management upheaval which resulted in the replacing of top management officials.
>
> "28. Procter & Gamble and the Phillip Morris Company approached the new management of De-

fendant CBS and again requested 'McGhee' for the Monday night time slot on Defendant CBS's television network.

"29. Defendant CBS again rejected the 'McGhee' show and told Procter & Gamble and the Phillip Morris Company that if they wanted to be on the CBS television network on Monday night at 9:30 p.m. they would have to sponsor a television series called 'Hazel'." [Clk. Tr. p. 14.]

On McGuire's own complaint, CBS's objections to these programs were not something that any advertiser could overcome. And appellant's extended quotation from Congressional Reports, hearsay though they are, seem to drive home the same point. For all of the instances appellant there cites as being "a rerun of the complaint herein" (Appellant's Br. p. 40) are episodes wherein networks forced programs on unwilling advertisers. (Appellant's Br. pp. 38-41.) One has thus squarely presented on the face of the complaint the question: Is it a breach of the antitrust laws to fail, when one does not have the power to control television, to get a show on the air? We cannot believe that it is.

Appellant's affidavits tell the same story.

Appellant Don McGuire, at Clerk's Transcript page 190, line 26, p. 191, line 7, sets forth that in the summer of 1964 he wrote, directed and produced "A MAN NAMED McGHEE" and "MEET MAGGIE MULLIGAN", two television pilots. General Foods financed these pilots (McGuire was aware that General Foods was financing eight pilots at a cost of $800,000). [Clk. Tr. p. 191, lines 31-32.] Various people advised Mr. McGuire that "McGHEE" was General Foods' first choice. [Clk. Tr. p. 193, line 4 and line 12.]

CBS, however, did not like McGHEE. Mr. McGuire says:

> "Around February 1, 1965, Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS. . . ." [Clk. Tr. p. 194, line 16.]

Mr. McGuire's affidavit goes forward to describe General Foods' attempts to get McGHEE accepted. At page 194, lines 21-27, he said:

> "Lee Rich shortly thereafter advised me that he had contacted Tom Dawson again, regarding McGHEE, and that Tom Dawson had told Rich that Aubrey was adamant and refused to air McGHEE; Rich asked for a meeting between the General Foods people and James Aubrey and Mr. Dawson called Mr. Rich back and advised that Mr. Aubrey would meet with the General Foods people the following morning in Los Angeles."

Thereafter [Clk. Tr. p. 195, line 5] he said that:

> "Messrs. Ebel, Barry, Rich and Pratt, according to Lee Rich, met with James Aubrey in Los Angeles to urge Aubrey and CBS to accept McGHEE but Aubrey refused."

Mr. McGuire follows his own affidavit with that of Abe Lastfogel, president of Wm. Morris Agency. Mr. Lastfogel set forth that he

> ". . . received a phone call from Mr. Rich, who asked me to be present at a meeting at the Bel Air Hotel which was attended by Messrs. Rich, Ebel, Pratt and Barry." [Clk. Tr. p. 199, line 5.]

Mr. Lastfogel's affidavit goes on to say:

> "They advised me that Tom Dawson of CBS had phoned Mr. Barry and Mr. Rich the night before and advised them that CBS *would not schedule the McGHEE series on CBS*. The four representatives wanted to explore what should be done by General Foods about trying to get CBS to change its position. The sum and substance of my conversation with them was that if General Foods, with all of its tremendous buying power at CBS, could not get CBS to reconsider and change its position, that there was no way I could be effective with CBS." (Emphasis added.) [Clk. Tr. p. 199, line 7.]

To sum up, then, appellant's affidavits are like his complaint. Both set forth the same tale: that General Foods paid for Mr. McGuire's television pilot: that General Foods tried to get Mr. McGuire's pilot onto television: that General Foods could not get Mr. McGuire's pilot on television. We do not understand, this being so, what General Foods is doing in this case. We understand clearly enough that Mr. McGuire claims that the reason General Foods could not get McGHEE on television is that CBS had a policy of taking on only shows it owned. But Mr. McGuire could not have set forth in plainer language the manner in which General Foods did its best. If, to repeat the language of Mr. Lastfogel's affidavit, filed on behalf of appellant, ". . . General Foods, with all of its tremendous buying power at CBS, could not get CBS to reconsider . . .", how can plaintiff complain that General Foods conspired against appellant (or anyone else)?

The principal argument, such as it is, supporting the claim of conspiracy, appears at page 80 of appellant's brief, in connection with its attack on Finding 11 [Clk. Tr. p. 238] that "General Foods has not agreed to boycott television programs and series in which CBS does not have a financial interest . . ."

We quote appellant (Appellant's Br. p. 80):

> "The record in this case does not support this finding. When GF agreed to sponsor two CBS owned and controlled television series, and basically scrap the eight television pilots it had made for some $800,000, didn't it agree to boycott television series in which CBS did not have a financial interest?"

The short answer is: No. To repeat, appellant's own affidavits say that "With all of its tremendous buying power at CBS", General Foods still "could not get CBS to reconsider and change its position" and run McGHEE. And according to appellant's complaint, Procter & Gamble and Philip Morris were also unable to get CBS to run McGHEE. To advertise on CBS, using a program which was going to be on CBS, is not a boycott of a program which was not going to be on CBS.

Essentially the same argument appears at pages 63-64 where appellant says that there is an issue about boycott. Underlining this whole chain of argument seems to be the notion that if I buy a Plymouth, I am thereby boycotting Ford and Chevrolet. This is not a boycott: there is no evidence of boycott in this record. A boycott is an agreement of two or more people not to patronize a third. There is no evidence in this record, even in McGuire's affidavits, that General Foods agreed with CBS not to patronize McGuire: the evidence in

the appellant's own affidavits is that General Foods tried to get McGuire's program on the air and failed. This is no conspiracy: this is no boycott.

The affidavit of Ed Ebel specifically sets forth that General Foods did not boycott independently owned programs. At Clerk's Transcript page 94, line 2:

> ". . . CBS is presently running, for General Foods, both ANDY GRIFFITH and GOMER PYLE, neither of which is owned by CBS."

And again [Clk. Tr. pp. 96-97, lines 25-1]:

> "17. General Foods has never agreed with CBS to monopolize television productions for the benefit of CBS (or otherwise). Such a monopoly would be seriously injurious to General Foods. In the past, such an arrangement would have prevented the development of two of our most effective advertising vehicles, THE ANDY GRIFFITH SHOW and GOMER PYLE, both of which were independently produced."

The finding of no boycott is sustained: there is no affidavit to the contrary: indeed, hearsay and all, McGuire's affidavit, Lastfogel's affidavit—all are to the effect that General Foods did *not* boycott: all say that General Foods tried to patronize McGuire but was prevented. On McGuire's own showing, accepting all his hearsay, there is no conspiracy: no boycott. That, we submit, disposes of the claim that there is an issue of fact over conspiracy (Appellant's Br. p. 24): over boycott (*Ibid.* p. 24 and p. 80): or attempt to monopolize. (*Ibid.* p. 24.)

II.

McGuire's Affidavits Are in Fact All Hearsay: the Affidavits Filed in Support of the Motion for Summary Judgment, Which Are Not Hearsay, Show That McGHEE Was in Fact Not Televised Because Other Programs Ultimately Appeared More Attractive. They Set Forth Facts, Not Denied, Showing No Conspiracy: No Attempt to Monopolize: No Boycott.

This lawsuit would indicate that "Hell hath no fury like an author scorned." And an author scorned, rather than any antitrust violation seems to be what produced this case. The affidavits filed in support of the motion for summary judgment, which in each instance carefully comply with Rule 56(e), disclose that McGHEE ultimately gave way to other programs which were preferred: doubtless, from the author's point of view, the worst of all evils, but no violation of the antitrust laws.

Edwin W. Ebel was vice president for advertising services for General Foods. His affidavit recites that he has personal knowledge of the facts set forth in his affidavit. [Clk. Tr. p. 91, line 8.] It is supported by the affidavits of Charles Pratt, Charles Barry, and Lee Rich, each of whom also had personal knowledge of the facts. [Clk. Tr. pp. 98-113.] These affidavits show that during the spring of 1964 General Foods arranged for the production of eight sample television programs, intending to use not all but the number needed, if any, to supplement carryover programs from the prior year. On January 18th and 19th, samples were viewed. In general, McGHEE received the best reception. [Clk. Tr. pp. 99; 105; 109.] No decision was made, because it

was necessary that the films be shown to various General Foods Divisions, and because General Foods did not yet know what CBS had to offer. [Clk. Tr. pp. 92; 99; 109.]

Thereafter, Messrs. Ebel, Lee Rich of Benton & Bowles, Charles Pratt of General Foods, Barry of Young & Rubicam, went to California, and viewed a CBS pilot called HOGAN'S HEROES and discussed a program which was then in the discussion stage only, at that time called COUNTRY COUSINS, later called GREEN ACRES. [Clk. Tr. pp. 92-93.] Of the General Foods group, Barry and Pratt thought that HOGAN'S HEROES was a better show than any of the pilots developed by General Foods. [Clk. Tr. p. 92, line 26.] Ebel was initially of the view that since it was set in a prison camp, it would be a poor vehicle for selling foods. [Clk. Tr. p. 92, line 28.] Ultimately, all agreed that it was the best available. [Clk. Tr. pp. 92-93.] COUNTRY COUSINS was of interest because of its producer, and because CBS intended to give it a highly desirable spot. [Clk. Tr. p. 93, lines 8-11.]

The ultimate decision with respect to CBS's programming necessarily finally rests on CBS. [Clk. Tr. p. 91, lines 10-11.]

James Aubrey of CBS did not like McGHEE. [Clk. Tr. p. 93, line 22; p. 111, line 9.] But while Aubrey did not like McGHEE, he did not refuse it, but "declined to schedule them [any of these shows—McGHEE and others] at times during which he felt he must run what were in his opinion stronger shows, in order to meet the competition of the other major networks." [Clk. Tr. p. 93, lines 26-30.]

Ultimately, McGHEE dropped out of consideration between January 25 and February 11. In detail, this whole story was described by Mr. Ebel as follows:

"6. During the week of January 25, Mr. Pratt of General Foods, along with Messrs. Rich and Barry of Benton & Bowles and Young & Rubicam, respectively, and I, met in Hollywood with Mr. James Aubrey and other representatives of CBS to discuss General Foods' programming for the 1965-66 season. The CBS group viewed our pilots and we in turn viewed the pilots which CBS was offering. Of the four CBS pilots, only one interested us. This was HOGAN'S HEROES, which was received enthusiastically by all of our group, with the possible exception of Mr. Rich. Mr. Barry and Mr. Pratt expressed the opinion at the time that HOGAN'S HEROES was a better show than any of our own pilots. My own first impression was that it might not be a good vehicle for selling foods, since it was set in a prison camp, but that any possible disadvantage along this line would probably be offset by its potential as an audience-getter. We told Mr. Aubrey at one of our many meetings during this period that we would like to sponsor HOGAN'S HEROES. Mr. Aubrey was firm in wanting HOGAN'S HEROES scheduled for Friday nights at 8:30, but said that he was willing to offer it to General Foods for that time period.

"7. In addition to the pilot programs which he presented for our examination, Mr. Aubrey offered us partial sponsorship of a show entitled COUNTRY COUSINS (later re-titled GREEN

ACRES). I was particularly interested in this show because it was to be written and produced by Mr. Paul Henning, who had scored two successes during the 1964-65 season with BEVERLY HILLBILLIES and PETTICOAT JUNCTION. In addition, COUNTRY COUSINS was attractively scheduled. Mr. Aubrey told us that he planned to put it on between BEVERLY HILLBILLIES and THE DICK VAN DYKE SHOW on Wednesday nights. Both of these shows have been very successful, which makes the spot between them a very desirable one. Furthermore, it is my recollection that Mr. Henning was willing to do COUNTRY COUSINS only if it would be run in the Wednesday evening slot following BEVERLY HILLBILLIES. Thus, it was not possible to move COUNTRY COUSINS to another time slot nor move another program into the time slot scheduled by CBS for COUNTRY COUSINS.

"8. Concerning our pilots, Mr. Aubrey stated that he did not like McGHEE, because it had little potential for continuity. He also felt that neither THE BARBARA RUSH SHOW nor SAM AND SALLY would be successful. However, at no time did he refuse to run any of these shows. He merely declined to schedule them at times during which he felt he must run what were in his opinion stronger shows, in order to meet the competition of the other major networks. He made it clear, for example, that General Foods could broadcast SAM AND SALLY or McGHEE in its traditional spot at 9:30 on Monday nights. Neither did Mr. Aubrey take the position that CBS would

not run programs which it did now own. In fact, CBS is presently running, for General Foods, both ANDY GRIFFITH and GOMER PYLE, neither of which is owned by CBS.

"9. CBS has occasionally refused to run television programs which we proposed, and we have occasionally, but not always, acquiesced in these refusals. For instance, CBS originally did not want to run GOMER PYLE, but finally did accept it at my insistence. On another occasion, CBS refused to exhibit a proposed show starring Eve Arden on grounds of program suitability. We recognize that CBS necessarily has final responsibility for its programming. While we occasionally do not agree with their opinions of our shows, we would be equally unhappy if they did not continue to exert their best professional judgment to achieve the most attractive possible schedule, since the success of the shows which we sponsor depends in part upon the success of the shows which surround them.

"10. Network television time is planned on the basis of advertising minutes. Three advertising or commercial minutes are equal to a half-hour show, in the hours 7:30 through 11:00 PM. We had originally planned to schedule 15 commercial minutes in those hours for the 1965-1966 season. However, we eventually found it necessary to cut this to 12 minutes. It was at this time, between the week of January 25 and our February 11 meeting with Mr. Aubrey in New York, that McGHEE dropped out of consideration. The decision involved a combination of factors including the reduction of our requirements and the time avail-

able. I began by blocking in the existing General Foods shows that we planned to retain and then considering the alternatives for additional material. For example, I was not originally interested in 8:30 PM on Fridays but became interested after seeing HOGAN'S HEROES and learning that CBS had HOGAN'S HEROES scheduled for that hour. By the process of blocking selected programs into our total 12-minute requirement, we eventually came up with the following: THE ANDY GRIFFITH SHOW (a holdover General Foods show) (3 minutes); GOMER PYLE (another holdover General Foods show) (3 minutes); HOGAN'S HEROES (1½ minutes); COUNTRY COUSINS (1½ minutes); and LASSIE (1½ minutes).

"11. This left us with 1½ minutes to fill, which we tentatively planned to use at 9:30 on Monday nights. The most likely candidates for the slot were McGHEE and SAM AND SALLY. These would have been our own shows. Full sponsorship of a half-hour show amounts to 3 commercial minutes. Since this would have brought our total to 13½ commercial minutes, which was 1½ minutes more than we had been able to sell to our product divisions, we would have been faced with the problem of selling partial sponsorship of an untried show to another advertiser. An element of the decision was that our two advertising agencies, Benton & Bowles and Young & Rubicam, were apparently irreconcilably divided as to which of these two shows should be used.

"12. About that time, however, an alternative solution became available. In previous years, we had sponsored I'VE GOT A SECRET. We had not given it much consideration for the 1965-1966 season because it had been scheduled for 10:00 PM Tuesday night which we were not willing to accept. But when CBS rescheduled it to appear at 8:00 P.M. on Mondays, it again became attractive to us, especially since it is an inexpensive show with proven drawing power and the best buy for us. At no time did we ever agree to buy or pick up the option on a McGHEE series." [Clk. Tr. pp. 92-95.]

On the basis of these affidavits, the Court made Findings of Fact Nos. 5, 6, 7, 8 and 9, of which appellant has attacked 5, 7 and 9 at pages 73 through 79 of his brief. In general, the findings follow, although in more compact form, the description of events set forth in the affidavits above.

Basically, the argument on the findings is that whereas these findings say that General Foods had not finally committed on McGHEE, and that CBS did not reject McGHEE, appellant's affidavits say the contrary. (Appellant's Br. pp. 73-79.) (Before the trial court, appellant also urged that there were issues of fact on these points: Appellant's Brief pages 33-34: they do not list these points as issues of fact at this time. Appellant's Brief pages 23-24 claims that there are certain genuine issues of fact, but does not mention these points.)

At any rate, the difficulty with the argument is that appellant's affidavits consist almost totally of inadmissible evidence.

Rule 56(e) requires that:

> ". . . Supporting and opposing affidavits shall be on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Appellant claims that CBS refused to show McGHEE. In respect to the refusal, McGuire's affidavit is that ". . . Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS. . . ." [Clk. Tr. p. 194, lines 16-18.] This is hearsay at three removes: McGuire testified as to what Rich told him about what Dawson told him that Aubrey had told him.

The affidavit continues in the same vein. The next paragraph says that "Lee Rich . . . advised me . . . that Tom Dawson had told Rich that Aubrey was adamant. . . ." (*Ibid.* lines 21-23) In the following paragraph one has McGuire's hearsay as to what was supposed to have taken place at a meeting which he did not attend, (*Ibid.* pp. 194-195) and that is all there is on CBS's refusal. The same comment must be made with respect to the affidavit of Abe Lastfogel. The essential allegations contained therein are in paragraphs 7, 8, and 9 of the affidavit, at pages 198-199 of the Clerk's Transcript. Again, the material is entirely hearsay. "I was advised . . ." "I received information . . ." "I was told . . ." "I was advised" —these are the words preceding every paragraph. And there follows the affidavit of Sam Weisbord [Clk. Tr. pp. 201-202], wherein paragraphs 7 and 8 set forth that he received "information from my associates", and

in the following paragraph, the content of a call from "Mr. Sol Leon of our New York office . . ." There is not a word that is not hearsay on the whole subject. There is not a word of admissible evidence that CBS refused McGHEE: let alone evidence that General Foods conspired.

The alleged conflict over whether McGHEE was General Foods' "first choice" is even more ephemeral.

It is perfectly clear that there was a point in time when McGHEE was General Foods' first choice, and General Foods' affidavits show this. [Affidavit of Charles Pratt, ¶ 4, Clk. Tr. p. 99; Affidavit of Charles Barry, ¶ 5, Clk. Tr. p. 105.] It is equally clear, as we have set forth above, that ultimately it lost this position. The affidavit of McGuire shows also that there was a time when McGHEE was General Foods' first choice. It also is clear, from McGuire's affidavit as with ours, that actual exercise of the right to put the show on the air required the exercise of an option by General Foods. [McGuire: Clk. Tr. p. 191, lines 16-17; Weisbord, Clk. Tr. p. 202, line 1.] On that point, our affidavits are unequivocal that the option was never exercised. [Clk. Tr. p. 95, lines 30-31.]

And the showing of McGuire on this point to the contrary is entirely hearsay: by McGuire [Clk. Tr. p. 194, line 12] that he "was advised by Mr. Weisbord . . . that *he had been advised* (!!) that General Foods had picked up the option. . . .", and by Weisbord [Clk. Tr. p. 202, line 5] that he "received a call from Mr. Sol Leon of our New York office. . . ." to the same effect. There is nothing here.

Beyond this, all these "conflicts"—(conflicts between admissible and inadmissible evidence) do not matter

anyway. It does not make a particle of difference, as against General Foods, whether General Foods ultimately decided that it liked other programs better than McGHEE, or whether it tried to get McGHEE on CBS, and failed because it could not. In either event, it is not liable. Because we are concerned with a motion for summary judgment, and because the two descriptions make no difference, we propose to write much of the balance of this brief on the assumption that the hearsay contained in the McGuire affidavits is somehow or other admissible, for it seems to us in any event, there is no possible basis for liability on General Foods. Yet we do wish to point out that appellant's affidavits contain nothing in the way of admissible evidence to contradict the affidavits of Messrs. Ebel, *et al.*

And we point out again that Mr. Ebel has expressly set forth [Clk. Tr. p. 96, line 1] that General Foods has not agreed to boycott programs produced by competitors of CBS: that General Foods uses independently produced programs (GOMER PYLE and ANDY GRIFFITH): that General Foods has not agreed to a CBS "monopoly": that indeed, such a monopoly is strongly contrary to General Foods' interest [Clk. Tr. p. 96, line 17, *et seq.*] because of the value of such programs as GOMER PYLE to it.

Likewise, conspiracy is expressly denied. [Clk. Tr. p. 97.] And Mr. Ebel's affidavit that there is no conspiracy, and no boycott, is not contradicted, either by hearsay or otherwise in any of appellant's affidavits. Indeed it is endorsed by appellant's Congressional hearsay: which identifies GOMER PYLE and ANDY

GRIFFITH as two of the only three programs on CBS in which CBS did not have an interest.* (Appellant's Br. p. 61.)

Again we say, appellant has pointed to no evidence of conspiracy, no evidence of boycott, on the part of General Foods. There is no issue: an author's disappointment does not violate the Sherman Act.

III.

No Antitrust Claim Can Be Founded on General Foods' Inability to Persuade CBS to Put McGHEE on the Air: There Is No Issue of Fact on Conspiracy.

If CBS has a policy of putting only shows it owns on the air, and if that policy is illegal, then appellant has his remedy against CBS.[1] But how does anyone else get into the act?

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*The answers to appellant's interrogatories identify 12 such programs, not two. [Clk. Tr. p. 145, lines 5-10]. Whichever figure is right, General Foods remains as a patron of some of these programs: no conspirator against them.

[1]We here assume the truth of McGuire's claim that CBS excludes independent shows. We make this assumption solely *arguendo*. Both General Foods and CBS have filed answers denying this allegation (and all the material allegations of the complaint). [Clk. Tr. pp. 20 and 32.] General Foods has filed affidavits in connection with its motion for summary judgment which show that the door to independents was not closed: it sponsors independently produced shows. [Clk. Tr. pp. 93-94.] As will be seen below (Part IV hereof), appellant has filed no admissible affidavit to the contrary. CBS has had no opportunity as yet to present evidence, affidavits or argument since it was not a party to the motion which led to this appeal. CBS has advised the trial court that it will offer evidence at the appropriate time to disprove the facts alleged by appellant. [See Clk. Tr. pp. 280-281.] We do not intend, either by assuming the truth of any fact or positing arguments on any factual assumption, to prejudice anyone's defense. Our point at the present time is that even if those allegations were true, they state no claim against General Foods.

The complaint, in paragraph 5 [Clk. Tr. p. 8] says that beginning in 1960 CBS adopted a policy that it would not exhibit television shows which it did not own. The complaint then goes on and talks about an unlawful conspiracy to create a monopoly. And it defines the unlawful conspiracy and attempt to monopolize as ". . . the continuing efforts, insistence and demand of defendant CBS that it have a financial interest in and control of every television show and television series exhibited on its television network. . . ." [Clk. Tr. p. 10, line 27.] This would seem to be a one-man conspiracy: a contradiction in terms. In order to find some conspirators, appellant defines as co-conspirators ". . . all of those national television advertisers who . . . agree to advertise their products on defendant CBS's television network. . . ." [Clk. Tr. p. 6, line 10.] And similarly, every advertising agency involved in any such program is defined as a co-conspirator. [Clk. Tr. p. 6, line 21.] This is a conspiracy of monumental proportions: perhaps in the same sense, all who voted for President Johnson might have been described as conspirators against Senator Goldwater.

It is apparently plaintiff's theory that CBS's policy was illegal, and therefore, that every person who used CBS's facilities became a co-conspirator. Thus, on appellant's theory, during the days of the Electric conspiracy, every lady who purchased a refrigerator was a co-conspirator. Can this be the law?

The Supreme Court had that proposition before it in

> *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S. Ct. 400 (1927).

That was a suit by a photographic materials dealer against Eastman Kodak, charging an attempt to monopolize on the part of Eastman. The defendant urged that the plaintiff, the dealer, had participated in contracts by which Eastman sought to achieve its monopoly. The court overruled the argument, stating that:

> "There was . . . evidence . . . that the plaintiff had complied with the defendant's restricted terms of sale merely for the reason that otherwise it could not purchase or secure the goods necessary in the conduct of its business."
>
> 273 U.S. at 377, 47 S. Ct. at 404-405.

The same thesis appears in

> *Charles A. Ramsey Co. v. Associated Bill Posters,* 260 U.S. 501, 43 S. Ct. 167 (1923).

That case involved an association of bill posters that had established an agreement which included, among other provisions, the provision that members would deal only with solicitors of advertisers holding licenses from the association. The plaintiff was one of those who had obtained a license, in order to do business. He later brought suit against the association. The claim that he was a participant in this conspiracy was summarily disposed of with the observation that:

> "We find no adequate support for the claim that plaintiffs were parties to the combination of which they now complain."
>
> 260 U.S. at 512, 43 S. Ct. at 168.

The proposition thus established that a mere customer of a monopoly: a mere person who deals with a monopoly, is no conspirator, is plainly applicable here. The books are full of cases involving companies who have

purchased from, or sold to monopolies, conspirators or the like. Uniformly, they allow recovery by the person dealing with the violator: it is not even contended in these cases that a customer is a conspirator.

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996 (1948);

Bigelow v. RKO Radio Pictures, 150 F. 2d 877 (7th Cir. 1945); rev'd, 327 U.S. 251, 66 S. Ct. 574 (1946), on grounds which strengthen the case as authority on the point here under discussion;

Banana Distributors v. United Fruit Company, 162 F. Supp. 32 (S.D. N.Y. 1958); partially reversed on unrelated and nondispositive grounds, 269 F. 2d 790 (2d Cir. 1959).

Such a recovery is not reconcilable with the assumption that the customer is a part of the conspiracy.

In the motion picture industry exhibitors of motion picture films, had in many cases been customers of distributors on the distributor's illegal terms. In virtually scores of these cases a recovery was accomplished. Because an exhaustive list of these cases would fill pages, only a few representative examples are set forth here.

Loew's, Inc. v. Cinema Amusements, 210 F. 2d 86 (10th Cir. 1954);

Tivoli Realty, Inc. v. Paramount Pictures, 209 F. 2d 41 (5th Cir. 1954);

Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401 (S.D. N.Y. 1961);

County Theatre Co. v. Paramount Film Distrib. Corp., 146 F. Supp. 933 (E.D. Pa. 1956);

Sablosky v. Paramount Film Distrib. Corp., 137 F. Supp. 929 (E.D. Pa. 1955);

Leonia Amusement Corp. v. Loew's, Inc., 117 F. Supp. 747 (S.D. N.Y. 1953);

Don George, Inc. v. Paramount Pictures, 111 F. Supp. 458 (W.D. La. 1951);

Christensen v. Paramount Pictures, 95 F. Supp. 446 (D. Utah 1951);

DeLuxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983 (N.D. Ill. 1951);

Mission Theatres v. Twentieth Century-Fox Film Corp., 88 F. Supp. 681 (W.D. Mo. 1950).

All that is asserted against General Foods in this case is that General Foods wanted to put McGHEE on CBS: that CBS would not put it on, and therefore that General Foods had to take the programs that CBS was willing to put on. If that makes General Foods a conspirator, then surely every one of the companies listed in the cases above who were allowed to maintain actions as antitrust plaintiffs, because they were not considered to be parties to antitrust violations, could not have prevailed. As a matter of sheer common sense, the proposition that if I buy spinach because all the local grocery store has is spinach, I am thereby a conspirator against the carrot grower, is its own answer.

The law is clear that there is no "right" to buy time: no right, in an advertiser, to control programming. The Federal Communications Act leaves program control entirely in the hands of the licensee, subject to F.C.C. review.

Massachusetts Univ. Com. v. Hildreth & Rogers Co., 183 F. 2d 497 (C.A. 4th 1959).

And see,

N.B.C. v. U.S., 319 U.S. 190, 204-205, 63 S. Ct. 997, 1004 (1943).

If it was CBS's policy to run only its own shows: if it imposed that policy on all who wished to advertise, so that they could not have the benefit of CBS television without acceding, and if their policy was illegal, the advertisers were the victims: not the offenders. When General Foods spent $800,000, as plaintiff alleges, on programs of its own, all foreclosed from TV by CBS's policy, General Foods might conceivably complain over that policy. But it can hardly be sued as a conspirator.[2]

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[2]We cannot help but add that it seems singularly unlikely that such a policy would violate the antitrust laws. Whether a storekeeper chooses to sell his own, or someone else's wares, would seem to be his affair. Whether a magazine owns outright the stories it prints, or leaves republication rights in the author, would not seem to be an antitrust problem. Whether CBS sells time only (like space in a magazine) or provides the programs as well, would seem analogous. The Congressional Committee Reports described by appellant at pages 34 through 63 of his brief suggest that any change in the *status quo* falls in the rule-making jurisdiction of the F.C.C.: indeed it appears affirmatively that a rule restricting network ownership of programs to 50% has been proposed by the F.C.C. (Appellant's Br. p. 57). Doubtless, in considering such a rule, the F.C.C. must consider whether the public interest is better served by network or sponsor: *i.e.*, advertisers' selection of programs. It would not seem that this is an area adapted to peremptory court interference. Supervision of the quality of television programming is an authority vested in the F.C.C. through its licensing power: diversification of control is one of the factors considered. (See *McClatchey Broadcasting Co. v. F.C.C.*, 239 F. 2d 15 (D.C. Cir. 1956) If the court undertook to explore this problem, it would have to consider whether, unlike the situation in *United States v. R.C.A.*, 358 U.S. 340, 79 S. Ct. 457 (1959), this would appear to be a case where primary jurisdiction

Under all these cases, if the appellant were able to demonstrate that the refusal to use appellant's show is a violation of the antitrust law, General Foods is more accurately numbered among the victims of that refusal, rather than among the violators of the law.

Ring v. Spina, 148 F. 2d 647 (2d Cir. 1945);
Hartford Empire Co. v. Glenshaw Glass Co., 47 F. Supp. 711 (W.D. Pa. 1931).

But, by accepting what it cannot change, General Foods cannot be said to be conspiring to promote CBS's programs. Its alternatives, on appellant's own showing —short of going into the television business itself— would be either to "conspire" to promote NCB's programs or to "conspire" to promote ABC's programs, if advertising constitutes a conspiracy. If it wishes to advertise on network television at all, General Foods has no choice but to deal in terms of the requirements of the networks.

In the words of the Second Circuit Court of Appeals, General Foods

". . . is precisely the type of individual whom the Sherman Act seeks to protect from combina-

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rests in the F.C.C. (See generally on Primary Jurisdiction 3 Davis on Administrative Law, p. 1 *et seq.*)

We stop here now: if the legality of CBS's alleged practice of taking only its own shows is to be discussed, clearly the order allowing an interlocutory appeal ought to be reversed, and this appeal deferred until the case against CBS is disposed of. *Robbin v. American University,* 330 F. 2d 225 (D.C. Cir. 1964); *Panichella v. Pennsylvania R.R.,* 252 F. 2d 452 (3d Cir. 1958); *Sears, Roebuck & Co. v. MacKay,* 351 U.S. 427, 436, 76 S. Ct. 895 (1956); *Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc.,* 243 F. 2d 795 (2d Cir. 1957); *Flynn & Emrich Co. v. Greenwood,* 242 F. 2d 737, 741 (4th Cir. 1957), *cert. den.* 353 U.S. 976 (1957). And see the note of this Court in *Century Investment Corp. v. United States,* 277 F. 2d 247, 250 (9th Cir. 1960), disapproving of certificates allowing interlocutory appeals when productive of successive appeals on the same issues.

> tions fashioned by others and offered to such individual as the only feasible method by which he may do business."
>
> *Ring v. Spina,* 148 F. 2d 647, 653 (2d Cir. 1945).

And if, in this action, General Foods were suing CBS, it would not be barred by the *in pari delicto* doctrine;

> *Kiefer-Stewart v. Seagram & Sons,* 340 U.S. 211, 71 S. Ct. 259 (1951);
>
> *Bales v. Kansas City Star Company,* 336 F. 2d 439 (8th Cir. 1964);
>
> *Moore v. Mead Service Co.,* 190 F. 2d 540 (10th Cir. 1951);
>
> *Ring v. Spina,* 148 F. 2d 647 (2d Cir. 1945); and cases *supra,* p. 22,

because it would be apparent that General Foods "was a victim, rather than a participant in the alleged conspiracy."

> *Hartford-Empire Co. v. Glenshaw Glass Co.,* 47 F. Supp. 711, 717 (W.D. Pa. 1931).

One cannot be tortfeasor and tortfeasee simultaneously.

IV.

Not Only Is CBS "Policy" Not a General Foods' Offense: Appellant Has Not Even Shown Any Policy on the Part of CBS to Exclude Independently Owned Shows: This Part of Appellant's Case Also Rests Entirely on Hearsay.

It is central to appellant's case that CBS has a policy of excluding shows which it does not own. Appellant then would saddle General Foods with responsibility for this policy of CBS on the theory that a customer of CBS who knows of this policy is somehow responsible for it. The theory is incomprehensible:as we have seen, the customer of a conspirator or a monopoly is not a co-conspirator: rather the contrary—he is the target of the conspiracy. At any rate, the existence of this CBS policy is the cornerstone of appellant's case against anyone. Not only is this policy legally irrelevant to appellee, whatever it may mean to CBS: the fact is there is a total failure to produce admissible evidence of the CBS policy.

That independents are excluded is challenged by Mr. Ebel's affidavit. He sets forth [Clk. Tr. p. 96, line 28; p. 97, line 1] that CBS runs for General Foods two programs in which CBS has no interest. What showing does appellant make to the contrary?

Although McGuire says, in general terms, that there is "practically no television series exhibited on network television" that the networks do not control [Clk. Tr. p. 196, line 7] his particulars are to the contrary. McGuire's affidavit identifies two television programs with which he was concerned, one known as "HENNESSEY" which was exhibited by CBS. [Clk. Tr. pp. 189-190.] He sets forth that

> ". . . Neither defendant CBS nor defendant General Foods ever had any kind of ownership interest in this series. . . ." [Clk. Tr. p. 190, line 5].

He identifies a second program called "DON'T CALL ME CHARLIE", which he indicates was run on NBC for one year. He says that ". . . NBC never had any ownership interest in this series." [Clk. Tr. p. 190, line 24.] And as to General Foods, we have already pointed out that GOMER PYLE, and ANDREW GRIFFITH are independent shows.

None of this discloses any exclusion of independents. Indeed, merely between the parties to this lawsuit, it discloses four independent shows—and this without exploring third parties.

He then goes into his hearsay saga on McGHEE. And the statements he quotes say in plain terms that the reason CBS would not accept McGHEE was that CBS did not like the show. Thus [Clk. Tr. p. 194, line 16] he says: "Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS; according to Mr. Rich, Mr. Dawson said to Mr. Rich that Mr. Aubrey's only reason was that he, Aubrey, did not like the show."

How does he reach the contrary conclusion?

He quotes his agent, Mr. Lastfogel, as saying: ". . . that James Aubrey was determined to force General Foods to buy CBS shows only. . . ." [Clk. Tr. p. 195, line 1.] But this is Lastfogel, plaintiff's agent: this is not merely hearsay, it is opinion without the shadow of a foundation.

On what then is this claim based? Apparently it is based on the assortment of abstracts from Congressional Reports, and Administrative Reports, set forth at pages 34 through 65 of his brief, scattered in time from 1956 to 1966, including a 1956 letter from Mr. Donald Turner at a time when he represented a local television station. (Appellant's Br. p. 48.)

Part of this material is surely wrong, for as far back as 1956, it speaks of the disappearance of the independent—yet Mr. McGuire had HENNESSEY and DON'T CALL ME CHARLEY on the air within the past seven years. [Clk. Tr. pp. 189, 190.] The error should not surprise. *Ex parte* material of this sort is part of the political process: it is partisan in tone and necessarily variable in reliability. It is almost unnecessary to say that this sort of material is not admissible to establish a matter of fact in a lawsuit. The inadmissibility of precisely such reports was determined in *United States v. International Harvester Co.*, 274 U.S. 693, 702, 47 S. Ct. 748, 752, followed more recently on a related exclusion of evidence in this Circuit in *Olender v. U.S.*, 210 F. 2d 795, 802 (C.A. 9th 1954); and in *Aetna Portland Cement Co. v. F.T.C.*, 157 F. 2d 533, 550 (C.A. 7th 1946).

It remains even more fundamental, from General Foods' point of view, that such a policy, if established, would be a policy of the networks, *in opposition* to the advertisers, and no conspiracy. The alleged examples of exclusion of independents, set forth at pages 38 to 43 of appellant's brief, show CBS overruling Carter Products in the case of "YOU CAN'T TAKE IT WITH YOU" and CBS overruling Young and Rubicam in the case of FOUR STAR THEATRE. If

accepted this material may show CBS shoves its shows down its customers' throat: such forced feeding is the reverse of a conspiracy.[3]

V.

The "Exclusive Dealing" Claim Is a False Quantity.

It is a portion of appellant's theory that in some sense General Foods is "exclusive" to CBS. The claim is not true, but if the claim were true, its materiality is not apparent. What difference does it make to plaintiff whether General Foods gives its business to CBS, ABC, or Radio Luxembourg?

According to plaintiff each network has the same hostility to independent programs. Plaintiff says, quoting Congressional Reports, both here (Appellant's Br. p. 55), and before the trial court [Clk. Tr. pp. 225-226] that:

> "In recent years (since about 1957-58) the market in which an independent television program producer can sell his product has been progressively contracted. The percentage of independently produced and financed programs in network schedules has declined sharply. Such programs have been crowded out of network schedules by program series—in many cases hour-length film segments

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[3]The Congressional abstracts refer to Television Discount Patterns. This material is of course inadmissible under *United States v. International Harvester, supra.* In addition, it has no possible relevance. It is suggested by appellant that these discounts make General Foods "exclusive" to CBS. The discount quoted is 25% on sales of $100,000 or more. (Appellant's Br. p. 45) General Foods' volume is such that on the discounts quoted, it could obtain them from more than one network; hence they would have no such effect. [See Clk. Tr. p. 96 for GF's actual expenditures with NBC and ABC.] In any event, as will be seen, the exclusiveness issue is a false quantity.

—supplied by 'independents' but financed and controlled, both economically and creatively by network managers. *On all networks in 1964, 93.1 percent of total evening hours (6 p.m. to 11 p.m.) was occupied by programs either produced or under the direct economic control of network managers.* Only 6.9 percent was independently produced, financed, and licensed directly to advertisers." (Emphasis added.)

Consistently through his briefs, both here and at the trial court level, appellant has described the practice of which he complains as a practice of "the networks" (Appellant's Br. pp. 34-63) without distinction between them. And his affidavit, general though it be, is even more plain. We quote: [Clk. Tr. p. 196, line 2.]

"33. Based on my years in the entertainment business, my financial involvement in the entertainment business, and my knowledge of the industry from personal observations, I know that the television networks over the past years have increased their ownership, financial interest, and control over television series exhibited during prime time until today *there is practically no television series exhibited on network television during prime time that is not financially controlled one way or another by the television network exhibiting the show.*" (Emphasis added.)

Since, according to appellant, all refuse to accept independently owned shows: since, he says, "there is practically no television . . . not . . . controlled . . .", it could make no difference to appellant whether General Foods gave all its business to CBS or divided its busi-

ness between CBS, ABC, NBC and McGuire's claim that the networks are all the same makes nonsense of his question: why did not General Foods go to NBC? (Appellant's Br. p. 65.)

Factually, the claim that General Foods had agreed to give all its business to CBS does not give rise to a triable issue. The affidavit of Mr. Ebel, General Foods' vice president in charge of this area, set forth the following facts, nowhere contradicted by appellant:

> "20. General Foods has never agreed with CBS to sponsor television shows and series during primetime exclusively on the CBS television network, nor has General Foods ever understood that it was not to buy 'talent and time' for primetime on any other television show." [Clk. Tr. p. 97.]

In addition, he set forth chapter and verse as follows:

> "14. We are presently purchasing the following advertising time from networks other than CBS:

	PRIME TIME		NON-PRIME TIME	
Network	Minutes	Value	Minutes	Value
ABC	96	$1,671,700	410	$1,101,100
NBC	16	289,900	924	3,376,700

> "15. In fiscal 1965, we purchased the following advertising time from networks other than CBS:

	PRIME TIME		NON-PRIME TIME	
Network	Minutes	Value	Minutes	Value
ABC	72	$869,000	96	$ 316,900
NBC	48	772,900	295	1,214,400

"16. In fiscal 1964, we purchased the following advertising time from networks other than CBS:

	PRIME TIME		NON-PRIME TIME	
Network	Minutes	Value	Minutes	Value
ABC	90	$899,500	689	$1,788,100
NBC	22	489,700	413	1,100,700

"17. General Foods has never agreed with CBS to monopolize television productions for the benefit of CBS (or otherwise). Such a monopoly would be seriously injurious to General Foods. In the past, such an arrangement would have prevented the development of two of our most effective advertising vehicles, THE ANDY GRIFFITH SHOW and GOMER PYLE, both of which were independently produced." [Clk. Tr. pp. 96, 97.]

The only response is: [McGuire Affidavit Clk. Tr. pp. 195-196.]

"31. Sponsorship of television series means that the sponsor (advertiser) agrees to pay for 'time and talent' for the show for a set number of shows (usually 26). The sponsor also pays the advertising agency 15% of the time charges. The average cost for a one half hour television show are: $70,000.00 for talent, $80,000.00 for time, for a total of $150,000.00. This means $3.9 million for 26 weeks.

"32. There are distinct advantages to being a sponsor of a television series as distinguished from 'spot sales.' To name a few: (a) a sponsor identification with the show, e.g. Bob Hope-Chrysler Theatre; (b) some control over the content of the show, e.g. guest aproval, script approval; (c)

control of the license to the show; (d) financial control of the show, particularly in succeeding years; and (e) involvement in 'show business.'

"35. I have studied the ratings which reveal who is sponsoring what television series on what network during prime time, and they show that General Foods is a sponsor of record of television series during prime time only on the CBS television network."

The last, again, is pure hearsay. But in any event all it says is that General Foods puts its sponsored shows on CBS. But General Foods is free to place its business where it chooses: such evidence does not support the claim of an exclusive dealing agreement. (*Crawford v. Chrysler,* 338 F. 2d 934 (6th Cir. 1964.) General Foods' contracts with CBS were identified in discovery. [Clk. Tr. p. 151.] No showing was made of an exclusive dealing contract: as we have seen, there is none.

Finally, in this connection, it must be observed that even if CBS had exacted a clause denying to General Foods the right to go elsewhere (which is not true), the violation of the laws would be that of CBS, not General Foods.

The basic policy of the United States as to tying clauses, exclusive dealing agreements, and the like, is set forth in Section 3 of the Clayton Act (15 U.S.C.A. § 14), as follows:

"It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, . . . for use, consumption, or

> resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

If an exclusive dealing agreement does not violate Section 3, it does not violate the antitrust laws at all.

> *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 335, 81 S. Ct. 623, 632 (1961);
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> *Standard Oil Co. v. United States,* 337 U.S. 293, 297, 69 S. Ct. 1051, 1054 (1949);
>
> *Cf. Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 608-09, 73 S. Ct. 872, 880 (1953).

Section 3 of the Clayton Act palpably does not create a cause of action as against General Foods. In the first place it applies only to a "lease . . ., [or] sale or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities. . . ." A contract for the sponsoring of television time or for the sale of advertising time or the like, is not a contract for the sale of goods, wares, merchandise, machinery, supplies, or anything else.

> *CBS v. Amana,* 295 F. 2d 375 (7th Cir. 1961), *cert. den.* 369 U.S. 812, 82 S. Ct. 689 (1962).

In the second place, the statute applies solely to the seller. It is intended to protect the buyer. It says, to

repeat, "it shall be unlawful . . . to lease or make a sale . . . or fix a price . . . upon the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, . . . or other commodities of a competitor or competitors of the lessor or seller. . . ." It is the seller who "make(s) a sale." By the same token, the condition forbidden is one which restricts the right of the buyer to "use or deal in the goods . . . of a competitor or competitors of the lessor or seller. . . ." Of record, up to the filing of this case, at least, the Government has never sought judicial relief against a buyer under Section 3 of the Clayton Act.

Precisely this problem is presented by the case of *Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc.*, 274 F. 2d 29 (7 Cir. 1959).

In that case, Culligan had in its contracts a provision requiring its dealers not to purchase or deal in water softening products made by competitors of Culligan. This was part of the franchise agreement. In 1956 the Federal Trade Commission filed a complaint, to which Culligan agreed to a consent order, requiring the cessation of the use of such contracts. Culligan, Inc. then sought to avoid the franchise contracts with its dealers on the basis that, in view of the exclusive dealing provision, the contracts were illegal. It was held that the contract remained in effect as against Culligan, and the dealer could enforce it. In *Crawford v. Chrysler*, 235 F. Supp. 751, *affirmed* 338 F. 2d 934 (6th Cir. 1964), Chrysler decided, in a move toward greater efficiency, to reduce the number of independent transport companies which it would use for delivery of automobiles; to that end, Chrysler forced its dealers to engage only the remaining transport companies, one of

which was sued, along with Chrysler, by a rejected transport company. After finding no conspiracy of any sort, the court said of the defendant transport company that it had done no wrong: "all it did was try to get business, just like [plaintiff] Crawford was trying to get business." (*Id.* at 754.) And comparably in *Dailey v. Quality Schools Plan Inc.,* decided July 6, 1967 (C.A. 5th) reported at p. X5 Antitrust Regulation Reports No. 313, 1967 Trade Cases 72,153 the Fifth Circuit held that section 7 of the Clayton Act, forbidding certain acquisitions, applies only to the acquiring corporation.

There being no violation of Section 3 of the Clayton Act in the present case, the matter is disposed of. As is said in *Tampa Electric Co. v. Nashville Coal Co., supra.*

> "We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, *for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden* by those of the former. Times-Picayune Pub. Co. v. United States, supra, 345 U.S. at pages 608-609, 73 S.Ct. at page 880." (Emphasis added.) (365 U.S. at 335.)

To sum up here:

(a) There is no issue as to existence of an exclusive dealing contract or tying agreement, for it was affirmatively shown, without contradiction, that there is none. Appellant has offered no evidence of such a clause.

(b) Such an agreement, if any, would be an antitrust offense only on the part of the person exacting the tying clause (or exclusivity clause).

VI.

Appellant's Complaints Concerning Want of Discovery Are Without Merit. Appellant Agreed to the Procedure Followed. Similarly, the Taking of Oral Testimony on a Motion for Summary Judgment Is Entirely Within the Court's Discretion.

At page 18 of his brief, appellant recites that no discovery was had as to General Foods. Again, in urging that it was error not to allow the taking of oral testimony on the motion for summary judgment, appellant says that "no discovery of any kind was had as to appellee G.F." We are not clear whether appellant claims this want of discovery was an error or not (although it is not assigned as an error): hence, as a matter of caution, the following.

The procedure followed by the court was fixed by court order upon agreement by the parties. The Reporter's Transcript of Proceedings for Monday, April 18, 1966, covers the events. (Pp. 16-17.)

On that day, the motion for summary judgment came on for hearing. No affidavits had then been filed in opposition. McGuire, however, had interrogatories pending against CBS. He asked only that those be answered before argument, saying:

> "He made the pilot. They liked the pilot. They didn't get it on. Nowhere in the General Foods' affidavits will you find that they took the show 'McGhee' made by my client and took it to another network to put it on. They can't take it to another network, is our allegation in the Complaint, because they are in fact exclusive to the defendant CBS.

"The interrogatories that we have asked CBS are right on these points. We asked them the question as to why the show was rejected. Are they exclusive? Are they written contracts?

"So I feel that in the interest of justice and procedure I would suggest that first the court after hearing from Mr. Vaughn ascertain when CBS can file the answers to the interrogatories. They have filed objections to some on Friday. I haven't yet received them. They are apparently at my office right now. Then set a new date on the objections to those interrogatories, those that they are objecting to, and then a week, two weeks, after the interrogatories are filed from the defendant CBS hear this motion for summary judgment.

"*If the court wishes I will hold off filing interrogatories on the defendant General Foods until after the court hears this motion for summary judgment.*

"What I would prefer to do is to go ahead and file the interrogatories even on Defendant General Foods. I know they will need time. But I would give them *enough time to answer until after the court decides the motion for summary judgment.*" (Emphasis added.)

Counsel's proposal, then, was to complete discovery against CBS: withhold discovery against General Foods, and argue the motion.

The proposal was agreed to. After a little intervening discussion on behalf of appellee, the court accepted appellant's proposal. The discussion was as follows:

"The Court: As I understood it, Mr. Sheridan, you want to file some additional affidavits?

"Mr. Sheridan: That is correct, your Honor.

"The Court: So that we are talking about arguments here based upon an incomplete file?

"Mr. Verleger: Yes.

"The Court: I think that we ought to have those affidavits on file and then argue it. It should be done within a reasonable time.

"I think Mr. Sheridan should refrain from any further discovery or any discovery as against General Foods.

"In all probability the information you are getting from your present interrogatories will be sufficient to permit you to file affidavits at least to the extent that we can get General Foods' position in this case in focus.

"Mr. Sheridan: *Fine, Your Honor.*

"The Court: We can determine whether or not they are properly here, and if not release them. If so, you can go ahead with your discovery. So I don't know that an extensive discussion of the facts at this time—" (Emphasis added.)

And at the conclusion of the discussion there appears:

"Mr. Sheridan: If I understand correctly, then, the defendant CBS will have its interrogatories filed by the 23rd of May.

"The Court: Yes.

"Mr. Sheridan: Then we will continue the hearing on the objections to the interrogatories by defendant CBS.

"The Court: Yes.

"Mr. Sheridan: Thank you, your Honor.

"The Court: And the plaintiff is not to conduct any further discovery against General Foods.

"Mr. Sheridan: *That is correct.* We will not." (Emphasis added.)

The minute order followed the agreement of counsel, continuing the motion for summary judgment, and providing for no further discovery against General Foods. [Clk. Tr. p. 129.]

In addition, appellant contends that the trial court erroneously quashed subpoenas for oral testimony at the hearing on the motion for summary judgment. For much the same reasons, there is no merit in this claim.

There is no provision in Rule 56 for oral testimony on a motion for summary judgment. It provides for affidavits which may be "supplemented or opposed by depositions or further affidavits." (F.R.C.P. 56(e).) Appellant is therefore relegated to Rule 43(e) which as to motions generally says that the court "*may* direct that the matter be heard wholly or partly on oral testimony or depositions."

Doubt has been expressed as to whether 43(e) applies to motions for summary judgment, because use of oral testimony would deny the 10 day period otherwise allowed to respond. (*Chan Wing Cheung v. Hamilton,* 298 F. 2d 459 (1st 1962).) F.R.C.P. 43(e) expressly refers to oral testimony as well as affidavits and depositions: F.R.C.P. 56 only to depositions and affidavits, a difference which would seem to be intentional. In *Burnham Chemical Co. v. Borax Consolidated,* 170 F. 2d 569 (9th Cir. 948), this court allowed oral testimony in a motion for summary judgment, but the proceed-

ing appears to have been governed by stipulation. Assuming that 43(e) does apply, nothing is clearer than the use of the word "may" in 43(e). Whether to receive oral testimony on a motion is wholly discretionary with the court. *Urquhart v. American-LaFrance Foamite Corp.,* 144 F. 2d 542 (D.C. Cir. 1944); *Penello v. Int. Bro. of Electrical Workers,* 223 F. Supp. 44 at 48 (D.C. Dist. Ct. 1963); *Dr. Beck & Co. v. General Electric Co.,* 210 F. Supp. 86 (S.D. N.Y. 1962); *Williams v. Minnesota Mining & Mfg. Co.,* 14 F.R.D. 1 (S.D.Calif. 1953).

In our case no real showing was made as to the need for oral testimony. In response to General Foods' motion that oral testimony not be taken, McGuire filed only this response [Clk. Tr. p. 133]:

> "Plaintiff Don McGuire opposes defendant General Foods motions to quash a subpoena and to prevent the taking of any testimony on the hearing of defendant General Foods' motion for summary judgment on the following grounds:
>
> "1. It is not an attempt to avoid the Court's order to withhold discovery on defendant General Foods until after the hearing on the motion for summary judgment.
>
> "2. The subpoena on Ebel is not unreasonable or oppressive.
>
> "3. Plaintiff is entitled to attempt to show that there are material facts in dispute.
>
> "4. Plaintiff should be allowed to cross-examine affiants and the Federal Rules of Civil Procedure so provide."

Unless the court is under an obligation to receive oral testimony on *all* motions for a summary judgment, that is no showing at all. Doubtless, on a proper

showing, the court would have modified the prior order, entered by agreement, that discovery be withheld pending disposition of the motion for summary judgment. But vacation of that order was never even requested: in fact the paper last quoted seems to agree that the court's order *re* discovery should remain in effect and to assert that the subpoenas were not for discovery. And no application was even made, under Rule 56(f) for leave to take depositions before the motion was decided: indeed, as we have seen, it was agreed that appellant would complete his discovery against CBS, and have no discovery against General Foods.

VII.

This Is a Plain Case for Summary Judgment.

This is a case, wherein the only affidavits offered by appellant, hearsay though they be, furnish evidence that General Foods was not able to get his television program on television. And the only foundation for the claim of conspiracy is the claim that when General Foods found that CBS would not put "McGHEE" on the air, General Foods accepted what CBS had to offer. It is hard to imagine a less conspiratorial recital.

What then is said to the contrary? Pages 23 through 33 of appellant's brief collect authorities memorializing the reluctance of the courts, in inappropriate cases, to grant summary judgment. As a class, these cases hold that if there is an issue, whether it be an issue as to intent, or as to something else, summary judgment should not be granted. But where is the issue here? One cannot describe, as plaintiff has, a completely unambiguous, non-conspiratorial set of facts, and then assert that there is an issue simply by claiming that there is a question as to intent.

In *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 362 F. 2d 1008 (9th Cir. 1966), this court affirmed a summary judgment when affidavits showing a claimed conspiracy were not forthcoming. In that case, as appears from the decision on the prior appeal, *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F. 2d 1 (9th Cir. 1963), the charge was that there had been an agreement between Lucky and its distributors that none of them should carry Coors or any other competitive beer. Affidavits supporting that claim were not forthcoming, and the judgment affirmed, the court saying:

> "The evidence presented does not show any contract, combination, or conspiracy to effect a group boycott; still less does it show any 'unreasonableness' in the restraint effected. At most it shows a condition to dealing unilaterally laid down by appellee, and appellee's refusal to abandon that condition in various conversations between appellee and the individual distributors wherein those distributors attempted to obtain relinquishment of the condition. This, as our previous opinion shows, is not enough to establish liability under Section 1 of the Sherman Act." (362 F. 2d at 1009.)

In exactly the same way, if we accept appellant's affidavits, all they show is that CBS unilaterally refused to put McGHEE on television. Wherein then is the violation of the Sherman Act? Wherein is there any question of "intent" here?

Repeatedly running through appellant's argument there appears the assumption that general allegations of conspiracy, in the complaint, are sufficient to raise an issue. For that reason, we presume appellant tabu-

lates the complaint and answer as an exhibit. But nothing could be more clear that under Rule 56(e), as amended in 1963, the opposition to a motion for summary judgment must contain "specific facts", based on "personal knowledge", about which "the affiant is competent to testify".

> "More is required from an affiant than mere hearsay and legal conclusion."
>
> *Doff v. Brunswick Corporation,* 372 F. 2d 801, 804 (9th Cir. 1967);
>
> *Engelhard Industries, Inc. v. Research Instrumental Corp.,* 324 F. 2d 347 (9th Cir. 1963), *cert. den.* 377 U.S. 923, 84 S. Ct. 1220, 12 L. Ed. 2d 215 (1964);
>
> *Washington v. Maricopa County,* 143 F. 2d 871 (9th Cir. 1944).

An affidavit must be on personal knowledge.

> *S & S Logging Co. v. Barker,* 366 F. 2d 617, 624-625 (9th Cir. 1966).

The idea that a general allegation in the complaint is sufficient to prevent summary judgment was given specific burial by the adoption of Rule 56(e) of the Federal Rules of Civil Procedure: since the adoption of that rule, even in the circuits which formerly held a contrary view, it is clear that such general allegations have no effect.

> *Dressler v. The MV Sandpiper,* 331 F. 2d 130 (2d Cir. 1964);
>
> *Schwartz v. Associated Musicians of Greater New York, Local 802,* 340 F. 2d 228 (2d Cir. 1964);
>
> *Erickson v. United States,* 340 F. 2d 512 (5th Cir. 1965).

Dressler v. M.V. Sandpiper, supra, is followed in *Poster Exchange, Inc. v. Paramount Film Dist. Corp.,* 340 F. 2d 320 (5th Cir. 1965), an antitrust case.

Scarborough v. Universal CIT Credit Corp., 364 F. 2d 10 (5th Cir. 1966);

Fitzgerald v. Westland Marine Corp., 369 F. 2d 499, 500 (2d Cir. 1966).

Again, at pages 65, and 68, appellant has collected cases dealing with the legality of exclusive dealing agreements or tying clauses. We need not attempt to analyze these—the record affirmatively shows without contradiction, as we have seen, that nothing of the sort exists here, and beyond that, that if there were such an agreement, the offense would be that of CBS.

Ours is a case where the appellant charges a conspiracy between CBS and each and every advertiser and each and every radio sponsor in the entire television industry. The sole basis for that charge, against everyone else, as against General Foods, apparently is that these companies patronize CBS. It can be hardly doubted that a general inquiry into the conduct of CBS with every advertiser, with every sponsor, from the beginning of time forbodes a lawsuit in which the process of discovery, if carried to a complete conclusion, will have a duration measured in the tens of years, and the trial measured in hundreds. It is worthy therefore to note the words of the Court of Appeals for the District of Columbia Circuit in *Washington Post Co. v. Keogh,* 365 F. 2d 965 (1966), at page 968:

> "Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoi-

dance of long and extensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement."

We can imagine no case more appropriate for the exercise of this power than the present one.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILIP K. VERLEGER